Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of the Joint Application of Matrix Telecom, Inc. Matrix Telecom of Virginia, Inc. Assignees, and Comtel Telcom Assets LP Comtel Virginia, LLC Assignors For Grant of Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, and Sections 63.04, and 63.24 of the Commission's Rules to Complete an Assignment of Assets of Authorized Domestic and International Section 214 Carriers	)	WC Docket No. 10-82

INDEX OF EXHIBITS TO REPLY COMMENTS OF COMTEL TELCOM ASSETS LP AND COMTEL VIRGINIA LLC TO COMMENTS OF HYPERCUBE TELECOM, LLC

A. *Order, Hypercube LLC v. Comtel Telcom Assets LP,* CA No. 3:08-CV-2298-G, 2009 WL 3075208 (N.D.Tex.)(September 25, 2009).

B. Texas PUC Staff Recommendation in *Hypercube v. Level 3,* Docket No. 37599 (Texas PUC) (March 30, 2010).

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EXHIBIT A

Order, Hypercube LLC v. Comtel Telcom Assets LP,
CA No. 3:08-CV-2298-G, 2009 WL 3075208 (N.D.Tex.)
(September 25, 2009)

Slip Copy, 2009 WL 3075208 (N.D.Tex.)
(Cite as: 2009 WL 3075208 (N.D.Tex.))

United States District Court,
N.D. Texas,
Dallas Division.
HYPERCUBE LLC, et al., Plaintiffs,
v.
COMTEL TELCOM ASSETS LP d/b/a Excel Telecommunications, Inc., Defendant.
Civil Action No. 3:08-CV-2298-G.

Sept. 25, 2009.

West KeySummary
Telecommunications 372 929

372 Telecommunications
372III Telephones
372III(G) Rates and Charges
372k928 Filing of Rates or Tariffs
372k929 k. In General. Most Cited Cases
Telecommunications company's failure to adopt tariff held under a different name rendered the tariff invalid. The company did not reissue the tariff in its new name after the change, and it did not file notice with the Federal Communications Commission (FCC) that it was adopting the tariff held under the previous name. 47 C.F.R. § 61.171.

Steven Herb Thomas, Mcguire Craddock & Strother, Dallas, TX, Joseph P. Bowser, Michael B. Hazzard, Arent Fox LLP, Washington, DC, for Plaintiffs.

J. Robert Arnett, II, Jennifer Beth Ingram, Ryan Mt. Allen, Tanja K. Martini, Munck Carter PC, Dallas, TX, James H. Lister, Birch Horton Bittner & Cherot PC, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

A. JOE FISH, Senior District Judge.

***1** Before the court is the motion of the defendant, Comtel Telecom Assets LP d/b/a Excel Telecommunications ("Excel" or "the defendant"), for partial judgment on the pleadings. For the reasons discussed below, the motion is granted in part and denied in part.

I. *BACKGROUND*

Excel is a long distance telephone company. Excel's Motion for Partial Judgment on the Pleadings and Brief in Support ("Motion") at 2. More specifically, Excel is an interexchange carrier ("IXC"), which means that Excel does not provide local telephone service. *Id.* Rather, Excel pays local telephone companies, known as local exchange carriers or LECs, to connect customers into Excel's network. *Id.* In other words, Excel pays a fee to an LEC that connects a call from the caller's local network into Excel's more extensive long-distance network. *Id.* On the terminating end of the call, Excel pays a fee to a different LEC to connect the call to the call recipient. *Id.* Typically, there are four LECs involved in one long-distance call. On the originating end of the call, there is usually a small, local LEC, which transfers calls to a larger LEC, which then transfers the call to an IXC like Excel. *Id.* The same process takes place in reverse on the terminating end of the call. *Id.* IXCs like Excel pay a large fee to the small, local LEC, and a small fee to the larger LEC. *Id.* at 2-3.

Wireless carriers, however, are specifically excluded from the definition of LECs. 47 U.S.C. § 153(26). In fact, the Federal Communications Commission ("FCC") "prohibits wireless carriers from imposing access charges on IXCs, even though they originate calls much like LECs, based on a policy decision that recognizes that wireless carriers are subject to very little regulation and have other offsetting advantages." Motion at 3 (citing *In re Sprint PCS,* 17 F.C.C.Rcd. 13192, ¶¶ 8-9, 12 (2002)). Thus, an IXC like Excel pays no fee to a wireless carrier. *Id.* Usually, however, a wireless carrier transfers calls to an LEC, who then delivers the calls to the IXC. *Id.* The IXC still pays a fee to the LEC, but not to the wireless carrier. *Id.* at 3-4.

The plaintiffs, Hypercube LLC and Hypercube Telecom, LLC (collectively, "Hypercube" or "the plaintiffs"), claim to be LECs. Plaintiffs' Response Brief in Opposition to Defendant's Motion for Judgment on the

Pleadings ("Response") at 3; Motion at 4. According to the defendants, Hypercube asks wireless companies to send it calls, and Hypercube then sends those calls to a second LEC, which then transfers the call to Excel. Motion at 3. Hypercube is not a wireless carrier and therefore charges Excel for its services. *Id.* at 3-4. Hypercube shares its fees from Excel with the wireless company, however, to induce the wireless company to continue sending Hypercube calls. *Id.* at 4. Excel argues that this practice is an end-around of the FCC's prohibition against wireless carriers receiving fees from IXCs like Excel. *Id.* The defendants also argue that Hypercube has inserted itself into the call-chain unnecessarily and provides no additional service to anyone. *Id.* at 3-4. Excel asserts that it inadvertently paid a number of Hypercube's invoices "before realizing what Hypercube was up to." *Id.* at 4. Excel then informed Hypercube that it no longer required its services. *Id.* at 4-5. Hypercube, however, continues to receive calls from wireless carriers and then direct those calls to Excel, charging Excel for this service. *Id.* at 5. Excel claims it is "powerless to block traffic from Hypercube because Hypercube routes the calls through the [LECs], thus intermingling Hypercube calls with other legitimate traffic." *Id.*

***2** Hypercube has asserted claims for breach of Hypercube's federal tariff, quantum meruit, and also seeks a declaratory judgment that it is lawfully charging Excel for its services and that Excel must pay for any services Hypercube has provided. Complaint ¶¶ 31-52. Excel, in its motion for partial judgment on the pleadings, argues that the court should enter judgment in favor of the defendant on the breach of tariff claim and the declaratory judgment claim. Motion at 1. Excel argues that Hypercube's breach of tariff claim must fail because Hypercube has no tariff. Motion at 6. Excel contends that the federal tariff Hypercube claims to be a party to actually does not include Hypercube. *Id.* at 7. Further, Excel argues, the declaratory judgment action must fail because Excel has no obligation to purchase Excel's services. *Id.* at 10.

II. *ANALYSIS*

A. *Legal Standard*

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). When ruling on such a motion, the court must regard allegations of fact in the complaint as true. See *Cash v. Commissioner of Internal Revenue*, 580 F.2d 152, 154 (5th Cir.1978). The court may enter judgment on the pleadings only if the material facts show that the movant is entitled to prevail as a matter of law. See *Greenberg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir.1973). This standard is roughly equivalent to that applied on a motion under Rule 12(b)(6) to dismiss for failure to state a claim. *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367 (1990); see also *St. Paul Insurance Company of Bellaire, Texas v. AFIA Worldwide Insurance Company*, 937 F.2d 274, 279 (5th Cir.1991).

B. *The Breach of Tariff Claim*

Hypercube argues that Excel, by accepting its services, "has agreed and is required by law to pay Plaintiffs the tariffed rates for the services provided." Complaint ¶ 33. Excel now argues that Hypercube has no tariff. Motion at 7. Both parties agree that the tariff Hypercube relies on does not technically include Hypercube. *Id.;* Response at 6-7. The companies included on the tariff Hypercube cites are: KMC Telecom, LLC, KMC Telecom II, LLC, KMC Telecom IV, Inc., KMC Telecom V, Inc., and KMC Telecom Data, LLC. Hypercube was formerly known as KMC Data, LLC. Motion at 7. Neither the present name, Hypercube Telecom, LLC, nor the former name, KMC Data, LLC, appears on this list. *Id.* The plaintiffs assert that the name KMC Data, LLC was erroneously omitted. Response at 6-7. They contend that the tariff should not have included the name KMC Telecom Data, LLC-which does not exist-and should have included the name KMC Data, LLC. Response at 7. Hypercube argues that the omission of KMC Data, LLC was a mere typographical error, and that it should not keep Hypercube from receiving the fees it earned.

***3** The court agrees with Hypercube. As the plaintiffs put it, "Hypercube's failure to identify and correct this misnomer is a minor, ministerial issue that does not negate application of the tariff." Response at 8. Although both parties spend a great deal of time arguing over a handful of cases that they view as relevant, the court's own review of those cases has led it to conclude that none of them addresses a situation where there is an accidental omission or typographical error in a tariff. Excel cites the "filed rate doctrine," which

requires that any regulated entity charge only the rates that are properly filed with the appropriate regulatory authority but precludes a court from determining what the regulatory body would have deemed to be a reasonable rate. *Occidental Chemical Corporation v. Louisiana Public Service Commission*, 494 F.Supp.2d 401, 417-18 (M.D.La.2007). This doctrine in no way suggests that a typographical error in a tariff invalidates the tariff entirely. The other cases on which Excel relies deal with the requirement that when an entity changes its name, it must, as the newly-named entity, adopt the tariff of the old entity, or the tariff does not cover it. *MacLeod v. Interstate Commerce Commission*, 54 F.3d 888, 890 (D.C.Cir.1995); *In re Americana Expressways, Inc.*, 133 F.3d 752, 757-58 (10th Cir.1997) (holding that where an entity filed for bankruptcy and became a debtor in possession, the company's status was altered to such an extent that it must adopt the tariff of the "old" entity). While these cases may suggest that Excel need not pay any fees incurred after Hypercube changed its name from KMC Data, LLC to Hypercube Telecom, LLC, they certainly do not hold that a typographical error in a tariff invalidates that tariff. In short, neither the cases cited by the parties, nor those found by the court in its own research, so hold.

Furthermore, the court notes that Excel did not discover the error in Hypercube's tariff until it "researched tariffs after the dispute escalated." Excel's Reply in Support of its Motion for Partial Judgment on the Pleadings at 4. In other words, Excel was fully aware of Hypercube's existence and the fees it was charging Excel. Thus, Excel cannot claim that it suffered any injustice as a result of Hypercube's failure to catch this omission. Excel is not entitled to partial judgment on the pleadings as a result of the accidental inclusion of the word "Telecom" in Hypercube's tariff.

Excel also argues, however, that Hypercube's tariff was ineffectual as of the date it took on the name Hypercube. Under 47 C.F.R. § 61.171, when a carrier changes its name or when its operating control is transferred from one carrier to another, whether in whole or in part, "the successor carrier must file tariff revisions to reflect the name change." The regulation indicates that this revision should take place "immediately." *Id.* Here, Hypercube states that it "acquired control of KMC Data LLC effective March 3, 2006." Response at 6. Thus, under the regulations, Hypercube was required to alter KMC Data LLC's tariff to reflect that change. Hypercube could either have reissued the tariff in its own name, or filed notice with the FCC that it was adopting KMC Data LLC's tariff. Hypercube did neither.

***4** The question, then, is whether that failure to adopt KMC Data LLC's tariff renders the tariff invalid. The court concludes that it does. In *MacLeod*, a transportation company had changed its name. Under 49 C.F.R. § 1312.15(a)-formerly 49 C.F.R. § 1312.20(b)(i)-a regulation of the Transportation Code that is highly analogous to 47 C.F.R. § 61.171, the newly-named company is treated as a new entity, which must adopt the tariffs of the old entity. *MacLeod*, 54 F.3d at 890. The court held that failure to follow this regulation means that the tariff has no association with the new entity and is therefore invalid. *Id.* *Americana Expressways* is similar. There, the transportation company filed for Chapter 11 bankruptcy. *Americana Expressways*, 133 F.3d at 753. The court ruled that when the company "became a debtor in possession, it became a fiduciary that assumed 'possession and control' " of its property and thus, under 49 C.F.R. § 1312.20, was required to amend or adopt the old rates. *Id.* at 757. Failure to do so meant that the plaintiff could not sue upon the invalid tariff. *Id.* at 758. Although both these cases deal with the Transportation Code rather than the Communication Code, 49 C.F.R. § 1312.15 is very similar to 47 C.F.R. § 61.171. The court finds the reasoning in *MacLeod* and *Americana Expressways* persuasive. Since March 3, 2006, when Hypercube acquired control of KMC Data, LLC, Hypercube has been relying on another entity's tariff. As *MacLeod* and *Americana Expressways* hold, Hypercube cannot file suit on a tariff that does not belong to it.

In a separate motion, Hypercube sought to supplement the evidence in support of its response to the instant motion by providing the court with an updated version of its tariff. The court granted that motion but withheld decision on the impact of the new tariff until ruling on this motion. The new tariff reveals that, as of March, 2009, Hypercube's tariff accurately reflects the company's full name. Thus, as of March 31, 2009, Hypercube had a valid tariff and was no longer relying on KMC Data, LLC's tariff. Hypercube cites no authority, however, suggesting that this revision can operate retroactively. From March 3, 2006 until March 31, 2009, Hypercube was relying on an invalid tariff, upon which it cannot file suit. To the extent

Hypercube seeks to recover fees incurred between those dates via the KMC Data, LLC tariff, it cannot-as a matter of law-do so.

C. *Is Excel Obligated to Purchase Hypercube's Services?*

Excel next argues it is entitled to judgment on the pleadings on Hypercube's declaratory judgment action. Motion at 10. Hypercube's declaratory judgment action asserts that the plaintiffs are entitled to a determination that the plaintiffs have lawfully charged Excel, and that Excel has breached the express contract between Hypercube and Excel by refusing to pay interstate access charges set forth in Hypercube's tariffs. Complaint ¶ 52. Excel, on the other hand, argues that it is entitled to judgment on the pleadings on this claim because it was not obligated to purchase Hypercube's services and because Excel never affirmatively or constructively ordered Hypercube's services. Motion at 10. First, as the court has already held, Hypercube had no valid tariff between March 3, 2006 and March 31, 2009. Thus, Excel's motion for judgment on the pleadings as to Hypercube's declaratory judgment action is granted to the extent Hypercube seeks to recover for any fees incurred between those dates. To the extent Hypercube seeks to recover for fees incurred outside those dates, the court must examine whether, as Hypercube contends, the law required Excel to purchase Hypercube's services.

1. *Do the FCC's Orders Require Excel to Purchase Hypercube's Services?*

***5** Under 47 U.S.C. § 201(a), "every common carrier engaged in interstate or foreign communication by wire or radio [must] furnish such communication service upon reasonable request therefor." Further, where the FCC finds it necessary, it may require carriers to establish physical connections with each other or to establish "through routes." 47 U.S.C. § 201(a). In other words, the FCC may require certain carriers to purchase the services of another carrier if it finds that such a requirement is necessary or would benefit the public. *Id.* However, a carrier is not obligated to purchase access services from LECs unless the FCC first compels it to do so. *AT & T Corporation v. Federal Communications Commission*, 292 F.3d 808, 812 (D.C.Cir.2002). Here, Hypercube argues that the FCC has ordered entities such as Excel to buy the services of entities such as Hypercube. Hypercube cites *In the Matter of Access Charge Reform*, 16 F.C.C.Rcd. 9923 (April 27, 2001) (hereinafter referred to as "the Seventh Report and Order") and *In the Matter of Access Charge Reform*, 19 F.C.C.Rcd. 9108 (May 18, 2004) (hereinafter referred to as "the Eighth Report and Order") in support of its argument that the FCC has established a through route forcing IXCs like Excel to purchase the services of LECs such as Hypercube.

The FCC issued the Seventh Report and Order and Eighth Report and Order in an effort to level the playing field between two types of LECs: incumbent LECs ("ILECs") and competitive LECs ("CLECs"). 16 F.C.C.Rcd. 9923 ¶¶ 1-7; 19 F.C.C.Rcd. 9108 ¶ 1. In the Seventh Report and Order, the FCC recognized that CLECs were charging much higher rates than the ILECs and required the CLECs to gradually decrease those rates over time. 16 F.C.C.Rcd. 9923 ¶¶ 3-4. The FCC also recognized that because IXCs were frustrated by CLECs' higher rates, many IXCs were refusing to pay for services provided by CLECs. *Id.* ¶ 23. "Additionally, [some] IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced." *Id.* ¶ 24. The FCC feared that if an IXC refused "to do business with a CLEC, it [would] become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area." *Id.* To prevent this problem, the FCC declared that "an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate [47 U.S.C.] section 201(a)." *Id.* ¶ 94.

Excel interprets the language of the Seventh Report and Order to mean only that IXCs cannot refuse to provide service to the *end user*, or customer, of a CLEC. Motion at 15-16. In other words, Excel argues that the Seventh Report and Order only requires an IXC to accept the services of a CLEC if that CLEC is the direct link between the customer and the IXC. *Id.* at 16. Excel reasons that it would be unreasonable to require an IXC to accept services of an intermediary LEC because "there may or may not be a valid engineering reason for one or more 'intermediary' LECs to be involved in transporting the call between the network of the originating carrier serving the end user and the IXC." *Id.* Excel posits an infinite chain of LECs, most of which are unnecessary, and all of which Excel is required to pay.

***6** Hypercube, on the other hand, argues that the "end user" requirement is nonexistent. Response at 16-18. The court agrees. Excel cites paragraph 94 of the Seventh Report and Order for the proposition that a CLEC must be in a direct relationship with a customer before the FCC forbids an IXC to refuse that CLEC service. Excel infers all this from the phrase "end user of a CLEC." Only two paragraphs later, however, the FCC repeats itself, stating "Above, we conclude that it would be a violation of section 201(a) for an IXC to refuse CLEC access service, either terminating or originating, where the CLEC has tariffed access rates within our safe harbor and, in the case of originating access, where the IXC is already providing service to other members in the same geographical area." 16 F.C.C.R. ¶ 96. Notably absent is the mention of any requirement that the CLEC be non-intermediary.

Moreover, the Eighth Report and Order, which expands upon and clarifies the Seventh Report and Order, specifically addresses intermediate CLECs such as Hypercube. 19 F.C.C.Rcd. 9108 ¶¶ 17-18. The Eighth Report and Order recognizes that there has been great dispute about "the rates charged by competitive LECs when they act as intermediate carriers." *Id.* ¶ 17. The FCC found that often "an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power." *Id.* Thus, the FCC adopted a new rule to address the situation: where the CLEC is performing as an intermediate carrier, it is not entitled to the full benchmark rate, but is entitled to tariff a rate that is the same as that "charged by the competing incumbent LEC for the same function." *Id.*

This language makes clear that the FCC has considered the relationship between IXCs and intermediate LECs-the very relationship at issue here-and believes that the intermediate LECs must be compensated for their service. Whatever minor confusion paragraph 94 of the Seventh Report and Order caused over whether the FCC requires IXCs to pay intermediary LECs, it has since been dispelled. The court therefore finds that the FCC requires IXCs to purchase the services of an entity such as Hypercube, so long as the other requirements-that the rates are within the safe harbor, and the IXC is already serving other LECs in the geographical area-are met. 16 F.C.C.Rcd. 9923 ¶ 94.

The court does, however, agree with Excel's argument that there could theoretically be an infinite number of unnecessary intermediate LECs demanding payment from IXCs. The FCC surely did not intend to require IXCs to pay LECs who are merely profiting from the FCC's rulings. As the FCC noted in the Seventh Report and Order, the purpose of requiring IXCs to purchase the services of LECs such as Hypercube is to protect "the ubiquity and seamlessness of the nation's telecommunications network." 16 F.C.C.Rcd. 9923 ¶ 24. Thus, where a CLEC is irrelevant to the ubiquity and seamlessness of the nation's telecommunications network, the IXC need not purchase its services. Although the FCC has not clearly stated as much, it is implicit in the purpose of the Seventh Report and Order and Eighth Report and Order. Thus, the court does not here rule that Excel must pay Hypercube the fees it demands. Although the FCC has ruled that entities like Excel must pay entities like Hypercube, this requirement is enforceable only so long as Hypercube adds value to the telecommunications network. In other words, if removing Hypercube from the chain of carriers would not disturb the flow of a customer's call, Excel is not required to purchase its services. A company that provides no additional value to anyone may not unnecessarily insert itself into a chain of carriers and take advantage of the FCC's decision that IXCs must pay LECs.

***7** The parties have not briefed the issue of whether Hypercube serves any purpose in maintaining the "ubiquity and seamlessness of the nation's telecommunications network." The court will therefore not address the issue here. The court today holds only that the FCC requires IXCs like Excel to pay intermediate CLECs such as Hypercube, so long as that CLEC adds value to the nation's telecommunications network.

2. *Has Excel Constructively Ordered Hypercube's Services?*

Even if Excel is not required to pay Hypercube pursuant to the FCC's orders, the parties agree that if Excel constructively ordered service from Hypercube, it is obligated to pay for that service. Both parties agree that a party makes a constructive request for service if the receiver of services "(1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in

fact receive such services." *Advamtel, LLC v. AT & T Corporation*, 118 F.Supp.2d 680, 687 (E.D.Va.2000). The parties disagree over whether Excel took reasonable steps to prevent the receipt of Hypercube's services. As discussed above, however, unless Hypercube provides no additional value to the telecommunications network, Excel *cannot* refuse Hypercube's services. Thus, unless the court later concludes that Hypercube adds no value to the telecommunications network, the issue of whether Excel constructively ordered Hypercube's services is moot. The court will therefore reserve decision on this question until such time as it becomes necessary to decide it.

III. *CONCLUSION*

For the reasons discussed above, Excel's motion for partial judgment on the pleadings is **DENIED** in part and **GRANTED** in part. The court grants the motion for judgment on the breach of tariff claim to the extent that Hypercube seeks to recover fees incurred under the KMC Data, LLC tariff between March 3, 2006 and March 31, 2009. The motion is denied to the extent Excel sought judgment on the breach of tariff claim as a result of the typographical error in the tariff. As to the motion for judgment on the declaratory judgment action, the court declines to rule on this portion of the motion until the parties address whether Hypercube's services are relevant to the "ubiquity and seamlessness of the nation's telecommunications network."

SO ORDERED.

N.D.Tex.,2009.
Hypercube LLC v. Comtel Telcom Assets LP
Slip Copy, 2009 WL 3075208 (N.D.Tex.)

END OF DOCUMENT

EXHIBIT B

Texas PUC Staff Recommendation in *Hypercube v. Level 3*
Docket No. 37599 (Texas PUC)
(March 30, 2010)

FILED

DOCKET NO. 37599

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COMPLAINT OF HYPERCUBE TELECOM, LLC AGAINST LEVEL 3 COMMUNICATIONS, LLC AND REQUESTS FOR INTERIM RELIEF AND WAIVER OF P.U.C. PROC. R. 22.242(c)	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S RESPONSE TO ORDER NO. 5 AND RECOMMENDATION

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files this Response to Order No. 5 and Recommendation.

Background. On October 26, 2009, Hypercube Telecom, LLC (Hypercube) filed a complaint against Level 3 Communications, LLC (Level 3) regarding intrastate access charges and requested interim relief and waiver of P.U.C. PROC. R. 22.242(c). On January 5, 2010 Hypercube amended its Complaint, Level 3 filed a response on January 26, 2010 and on February 24, 2010 Level 3 filed a Motion to Dismiss to which Hypercube filed its response and opposition on March 17, 2010. The P.U.C. Administrative Law Judge filed Order No. 5 on February 25, 2010 requiring Staff to file a recommendation by March 29, 2010.

Staff's Recommendation. Staff supports Level 3's motion to dismiss on the grounds that Hypercube has not stated a claim upon which relief may be granted. [1] However, Staff does not support Level 3's motion to dismiss or request a stay of the proceedings based on federal preemption.

Federal Preemption. Level 3 filed a Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls with the FCC on May 12, 2009 requesting original docket designation, but instead the FCC filed it in rulemaking proceedings.[2] The lack of docketing by the FCC makes it very unlikely that the FCC will act on the petition in the foreseeable future, if it all, and therefore Level 3's petition with the FCC does not support dismissal of Hypercube's complaint. The likelihood of the FCC acting on Level 3's

[1] P.U.C. PROC. R. 22.181(a)(1)(G).

[2] Opposition of Hypercube at 12, Fn. 6 and 7.

petition being remote at best, the request for a stay of the proceeding based on the FCC filing should be denied.

*2. **Hypercube's Business Operations.*** Hypercube claims to be a competitive local exchange carrier (CLEC)[3] and a common carrier[4] and states that "The calls at issue in this case are toll-free, 8YY calls that Hypercube delivers to Level 3 for termination to their 8YY subscribers on a for-profit basis. These calls primarily are made by consumers using their wireless phones to Level 3's 8YY subscribers."[5] Further, it states that "Hypercube provides interstate and intrastate access services to various customers, including IXCs. Hypercube's claims in the present complaint concern only its provision of intrastate access services to Level 3 in the State of Texas."[6] Hypercube further alleges that it "provides access and associated database query services in connection with a call made from a wireless telephone, Hypercube picks the call up at the mobile telephone switching office (MTSO) and transports it to Hypercube's switching equipment," and that, "while the call is in the Hypercube switch, Hypercube performs switching and routing functions and additional services, such as running a query of the national 8YY telephone number database to determine where the call should be routed (known as a 'database dip')."[7] After Hypercube performs its services, the call is then routed to the local exchange carrier (LEC) and then to the interexchange carrier (IXC), in this case, Level 3. Hypercube does not have a contract with Level 3.

*3. **Hypercube has not stated a claim upon which relief may be granted.*** It is clear from the foregoing as well as its own assertions that Hypercube's traffic originates from customers of wireless carriers with which it has an agreement for the calls to be routed to Hypercube and for which the wireless carrier receives remuneration. In its Eighth Report and Order, the FCC clearly stated:

> In cases where the carrier service serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf

[3] First Amended Complaint of Hypercube at 2.

[4] *Id.* at 16

[5] *Id.* at 12.

[6] *Id.* at 15.

[7] *Id.*

> of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC. **If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.** [emphasis added][8]

Any agreement between Hypercube and the wireless carrier that provides remuneration for access charges falls squarely within what the FCC has declared they will not condone: "We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly."[9] Because Hypercube has no contract with Level 3 for the payment for the access services it provides CMRS carriers, the FCC has made clear that Hypercube cannot charge Level 3 for those services.

*4. **Conclusion**.* The CMRS provider cannot charge for access services absent a contract, therefore it cannot receive compensation for the access services indirectly through agreement with Hypercube to route 8YY calls. There is no claim stated upon which relief can be granted, therefore Hypercube's complaint must be dismissed.

Dated: March 29, 2010

[8] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas.* Eighth Report and Order and Fifth Order on Reconsideration, 19 FCCR 9108, 9116 (2004).

[9] *Id.* at Fn 57.

Respectfully Submitted,

Thomas S. Hunter
Division Director
Legal Division

Keith Rogas
Deputy Division Director
Legal Division

Karen S. Hubbard
Legal Division
State Bar No. 18634400
(512) 936-7345
(512) 936-7268 (facsimile)
Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326

PUC DOCKET NO. 37599

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 29th day March, 2010 in accordance with P.U.C. Procedural Rule 22.74.

Karen S. Hubbard

EXHIBIT C

Proposed Decision Granting Motion to Dismiss
Hypercube Telecom, LLC v. Level 3 Communications, LLC
Case No. 09-05-009 (Cal. Public Utility Commission)
(April 16, 2010)

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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Adjudicatory

TO PARTIES OF RECORD IN CASE 09-05-009

This is the proposed decision of Administrative Law Judge (ALJ) DeAngelis. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ DeAngelis at rmd@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC:tcg

Attachment

Decision **PROPOSED DECISION OF ALJ DEANGELIS** (Mailed 4/16/2010)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Hypercube Telecom, LLC (U6592C), Complainant, vs. Level 3 Communications, LLC (U5941C), Defendant.	Case 09-05-009 (Filed May 8, 2009)

DECISION GRANTING MOTION TO DISMISS

1. Summary

We dismiss the complaint based on the failure to state a claim upon which relief can be granted. The proceeding is closed.

2. Facts

The material facts of this case are not in dispute.[1] Complainant, Hypercube Telecom, LLC[2] (U-6592-C) (Hypercube) seeks to collect charges

[1] Complaint at 11, "Hypercube contends that the issues underlying Hypercube's claims may be resolved on the basis of the pleadings submitted by the parties and that a hearing may not be required before the issuance of an Order awarding the relief requested by Hypercube."

[2] Hypercube holds a certificate to provide services as a competitive local exchange carrier (CLEC) granted by this Commission, either in its own name or under the name

Footnote continued on next page

pursuant to its California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2, from defendant, Level 3 Communications, LLC[3] (U-5941-C) (Level 3), for access services, database query service, and the routing of 8YY calls (also referred to as toll-free calls) to Level 3 for termination to Level 3's customers.[4] Hypercube does not provide the originating access service for these 8YY calls.[5] The calls originate on the networks of Commercial Mobile Radio Service carriers (also referred to as CMRS carriers or wireless carriers).[6] Hypercube picks up these calls at the wireless carriers' CMRS switching centers and delivers them to the incumbent local exchange carrier (ILEC) for routing to Level 3.[7]

Hypercube has contracts with CMRS carriers pursuant to which Hypercube makes payments to the CMRS carriers.[8] The details of these contracts and related payments are not alleged in the complaint. Because Hypercube does not provide originating access or, stated differently, "full end-to-end

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of its predecessor, KMC Data, LLC. Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 2 at 1.

[3] Level 3 holds a certificate to provide intrastate telecommunications services as a CLEC and interexchange carrier granted by this Commission. Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 1 at 1.

[4] Complaint, para. 1 at 1, para. 5 at 3, para. 9 at 4 and para. 27-28 at 12.

[5] Complaint, para. 26 at 8.

[6] Complaint, para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at. 2.

[7] Complaint, para. 26-28 at 12.

[8] Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 10 at 2.

functionality,"[9] CMRS carriers originate the calls and route the 8YY traffic to Hypercube pursuant to these contracts.[10]

While the call is at Hypercube's switch, Hypercube performs certain routing functions and additional services, such as running a query of the national 8YY telephone number database to determine where the call should be routed (known as a "database dip").[11] The database dip returns information regarding the identity of the interexchange carrier (IXC) whose 8YY customers have been called.[12] Hypercube delivers the calls to the ILEC who then sends the calls to Level 3 for termination at the 8YY customer.

Hypercube relies on its California Tariff, Schedule Cal. P.U.C. No. 2, to charge Level 3 for access services, including originating access services even though originating access is provided by the CMRS carrier.[13] The complaint does not allege the existence of any independent contracts between Hypercube and Level 3 or between the originating CMRS carrier and Level 3 to govern this relationship between any of the carriers and Level 3.

Level 3 claims the charges are unlawful under Hypercube's tariff and federal law.[14] Level 3 would prefer Hypercube not be involved in the routing of

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[9] Reporter's Transcript (Prehearing Conference August 11, 2009) (RT) 29: 15-17.

[10] Complaint, para. 16 at 8 and para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at. 2.

[11] Complaint, para. 28 at 12.

[12] Complaint at para. 28 at 12.

[13] Complaint, para. 16 at 8 and para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at. 2; RT 18: 14-15.

[14] Answer at 3.

8YY calls to Level 3's customers.[15] In response to Level 3's expressed preference for Hypercube to cease its involvement with these calls, Hypercube has requested that Level 3 block calls coming from Hypercube to avoid additional billing.[16] As an engineering matter, however, Level 3 contends that blocking is untenable as Level 3 is unable to identify in real time the particular calls that pass through Hypercube on their way to the ILECs and then to Level 3. Hypercube includes provisions in its California Tariff, Schedule Cal. P.U.C. No. 2, requiring IXCs, such as Level 3, to implement blocking as a means of rejecting service from Hypercube.[17] Level 3 has not implemented blocking because blocking remains infeasible.[18]

Hypercube continues to route calls to Level 3.[19]

Level 3 paid Hypercube's invoices for a period of time, from approximately November 2005 through October 2007.[20] Beginning in November 2007, Level 3 ceased payments.[21] By this complaint, Hypercube seeks to collect

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[15] Answer, para. 11 at 19.

[16] RT 25: 13-24.

[17] Hypercube's Intrastate Access Tariff, *California Tariff, Schedule Cal. P.U.C. No. 2,* 1st Revised Sheet 10, Sec. 2.1.3 (Jan. 1, 2009).

[18] RT 25: 13-24.

[19] Complaint, para. 1 at 2.

[20] Complaint, para. 32 at 13.

[21] Complaint, para. 33 at 13.

from Level 3 intrastate switched access charges in an amount no less than approximately $5.5 million plus any additional past-due amounts.[22]

The parties have attempted but failed to resolve this matter informally.[23]

3. Procedural History

On May 8, 2009, Hypercube filed a complaint. The Commission did not formally serve the complaint on Level 3 until approximately one month later. In the meantime, on May 12, 2009, Level 3 filed with the Federal Communications Commission (FCC) a Petition for a Declaratory Ruling (FCC Petition)[24] seeking to have the FCC declare the payment arrangement between Hypercube and the CMRS carriers pre-empted by federal law.

On June 1, 2009, the Commission formally served Level 3 with instructions to answer. On July 1, 2009, Level 3 filed its answer and a motion to dismiss or stay the complaint due to the pending FCC Petition. Hypercube filed a response in opposition to Level 3's motion. The parties also filed various other motions, the majority consisting of discovery disputes.

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[22] Complaint, para. 41 at 14.

[23] Complaint, para. 2 at 2; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 8 at 2.

[24] Level 3's FCC Petition is filed in CC Docket No. 96-262 *Access Charge Reform* and CC Docket No. 01-92 *Developing a Unified Intercarrier Compensation Regime*. The Petition is titled "Petition for a Declaratory Ruling" and captioned "In the Matter of: Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS Originated Toll Free Calls," "Docket No. 09-___." Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 11-12 at 2.

The schedule for this proceeding adopted by the December 7, 2009 scoping memo included the finding that formal hearings were needed. The assigned Administrative Law Judge (ALJ) delayed the hearings and later, on January 21, 2010, suspended the hearing dates due to ongoing and unresolved discovery disputes. Hypercube submitted prepared testimony on January 11, 2010. Because hearings were suspended in January 2010 and never rescheduled, this testimony was not entered into the record. Moreover, upon review of the existing pleadings, we found no material facts in dispute and concluded that the case may be resolved on the existing pleadings. We, therefore, change our original determination in the scoping memo regarding the need for hearings.

The scoping memo also excluded from the scope of the proceeding Level 3's counterclaims. Level 3 filed a separate complaint on February 23, 2010 naming Hypercube the defendant and consisting of the issues previously set forth in its counterclaims. The February 23, 2010 complaint has been docketed as Case (C.) 10-02-027. The Commission will address the matters in C.10-02-027 separately.

With today's decision, this proceeding is closed.

4. Standard of Review

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and on matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. *State of California Department of Transportation v. Crow Winthrop Development,* Decision (D.) 01-08-061 at 7.

5. Discussion

Hypercube seeks an order from the Commission declaring that it has lawfully charged Level 3 pursuant to its Intrastate Access Tariff, *California Tariff, Schedule Cal. P.U.C. No. 2*, and directing Level 3 to immediately pay approximately $5.5 million in intrastate charges plus additional outstanding amounts. Additional relief, including monetary fines, attorney fees and costs, a security deposit, and specific performance directives are sought by Hypercube. We find it unnecessary to discuss such additional relief as our decision today disposes of this matter in its entirety.

The question presented is whether Hypercube has stated a claim against Level 3 upon which the relief sought can be granted.

Our analysis starts with the principle supported by the FCC that rates must be tethered to particular services.[25] For example, the FCC has rejected the argument that CLECs "should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IEC."[26] In making this statement, the FCC reasoned that the opposite result, "in which rates are not tethered to the provision of particular services would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call."[27] The FCC reached this conclusion by relying on the Supreme Court in

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[25] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, para. 14 (2004) ("*Eighth Report and Order*").

[26] *Id.*

[27] *Id.*

AT&T v. Central Office Telephone, 524 U.S. 214, 223 (1998), "rates 'do not exist in isolation. They have meaning only when one knows the services to which they are attached.'" [28]

In its complaint, Hypercube alleges that it should be permitted to collect its switched access rate for a function, originating access service, provided by a CMRS carrier. In certain situations, Hypercube's service provided with a CMRS carrier may be permissible. For example, the FCC has explained that a CLEC may collect the full benchmark rate even when the CLEC does not originate or terminate the call to the end-user if the CLEC is collecting the rate pursuant to a "joint billing arrangement" with a carrier that does serve the end-user.[29] Importantly, for purposes of this complaint, the FCC noted that the "validity of these joint billing arrangements is premised on each carrier that is party to the arrangement billing only what it is entitled to collect from the IXC for the service it provides."[30]

Under the facts alleged in the complaint, Hypercube is arguably seeking to collect originating access charges on behalf of a CMRS carrier. However,

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[28] *Id.*; The Commission follows the same rule as reflected in the following order from *Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, Decision 07-12-020, 2007 Cal.PUC LEXIS at *35 ("Effective January 1, 2009, all California-certificated competitive local exchange carriers shall impose intrastate access charges no greater than the higher of Pacific Bell Telephone Company doing business as AT&T California's (AT&T) and Verizon California Inc.'s (Verizon) intrastate access charges per minute of use, plus 10%, and **each access charge rate element that is provided shall be no greater than the higher of AT&T's or Verizon's comparable charge, plus 10%, for that rate element.**") (Emphasis added.)

[29] *Eighth Report and Order,* para. at 16.

[30] *Id.*

Hypercube has not alleged the existence of a joint billing arrangement that provides Hypercube the right to collect rates for the CMRS carrier. Perhaps such a contract exists but Hypercube provided no details on its CMRS contract. Moreover, even if such an agreement existed, Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3. The FCC has long held that CMRS carriers may not file tariffs for call origination or termination but, instead, the CMRS carrier must establish an independent right to compensation.[31] Accordingly, Hypercube has not alleged sufficient facts to establish its right to collect originating access charges from Level 3 on behalf of the CMRS carrier under a joint billing arrangement or under an independent agreement between the CMRS carrier and Level 3.

As such, the facts alleged by Hypercube, even if true, state no cause of action against Level 3 under applicable law.

Conclusion

Hypercube has failed to state a claim against Level 3 for violation of Hypercube's Intrastate Access Tariff, *California Tariff, Schedule Cal. P.U.C. No. 2*. For these reasons, the Commission dismisses the complaint with prejudice.

6. Motions

A number of motions were filed in this proceeding. We confirm the rulings of the assigned ALJ. These rulings include the following:

1. Level 3 verbally moved for Hypercube to make available certain deponents on January 25, 2010. This request was granted verbally by the ALJ on January 25, 2010.

[31] *In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002).

2. Level 3 filed a motion to redesignate as non-confidential certain materials filed by Hypercube as confidential on January 19, 2010. The parties resolved this matter informally.
3. Level 3 filed a request to shorten time on January 19, 2010. The parties resolved this matter informally.
4. Level 3 filed a request for expedited telephonic hearing on January 19, 2010. The parties resolved this matter informally.
5. Level 3 filed a motion for leave to file under seal on January 19, 2010. This request was granted verbally by the ALJ on January 19, 2010.
6. Level 3 filed a motion for partial rehearing of ruling modifying schedule on January 14, 2010. This motion was denied by ruling of the ALJ on February 3, 2010.
7. Level 3 filed a motion to amend Level 3's motion to dismiss or stay the complaint on January 7, 2010. This motion was granted by ruling of the ALJ on February 3, 2010.
8. Level 3 filed a motion to request the taking of official notice on January 7, 2010. This motion was granted by ruling of the ALJ on February 3, 2010.
9. Hypercube filed a motion to compel on December 17, 2009. This motion was denied with leave to refile by ruling of the ALJ on February 3, 2010.
10. Level 3 filed a motion to modify the scoping memorandum and order on December 14, 2009. As to Level 3's request to extend the schedule, this request was granted by ruling of the ALJ on January 12, 2010. As to Level 3's request to include counterclaims within the scope of this proceeding, this request was denied by ruling of the ALJ on February 3, 2010.
11. Level 3 filed a motion to compel responses to discovery on December 11, 2009. This motion was denied by ruling of the ALJ on February 3, 2010.
12. Hypercube filed a motion to supplement the record on August 31, 2009. This motion was granted by ruling of the ALJ on February 3, 2010.

13. Hypercube file a motion to enter a confidentiality agreement and protective order on November 13, 2009. This motion was denied by electronic mail from the ALJ on November 16, 2009.
14. Hypercube filed a motion for leave to file a reply to the response on July 24, 2009. This motion was denied by electronic mail from the ALJ on July 24, 2009.
15. Hypercube filed a motion to order Level 3 to escrow charges associated with Hypercube's provision of tariff services on July 8, 2009. This motion was denied by ruling of the ALJ on February 3, 2010.
16. Level 3 filed a motion to dismiss or stay the complaint due to pending FCC proceeding on July 1, 2009. The motion to stay the proceeding was denied by a ruling of the ALJ on February 3, 2010.
17. Hypercube filed a motion for leave to file an amendment to its opposition to the motion of Level 3 to dismiss or stay on February 12, 2010. This motion was granted by electronic mail from the ALJ on February 23, 2010.
18. Level 3 filed a request for the taking of official notice and a motion for leave to file a second amendment to its motion to dismiss or stay on February 17, 2010. This request and motion were granted by electronic mail from the ALJ on February 23, 2010.
19. Level 3 filed a motion to compel response to second discovery on March 3, 2010. By this decision, we deny this motion.
20. Level 3 filed a motion for rehearing of ALJ's ruling on various motions (February 3, 2010) on March 3, 2010. By this decision, we deny this motion.
21. Hypercube filed a motion for summary judgment on March 8, 2010. By this decision, we deny this motion.

7. Statement of Appeal Rights

Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c).

8. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

9. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Regina M. DeAngelis is the assigned ALJ in this proceeding.

Findings of Fact

1. We find that no material facts exist in dispute and, as a result, this complaint can be resolved without evidentiary hearings and as a matter of law.

2. Hypercube has not alleged the existence of a joint billing arrangement that provides Hypercube the right to collect rates for the CMRS carrier.

3. Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3.

4. Hypercube has not alleged sufficient facts to establish its right to collect originating access charges from Level 3 on behalf of the CMRS carrier under a joint billing arrangement or under an independent agreement between the CMRS carrier and Level 3.

Conclusions of Law

1. The determination in the scoping memo that hearings are necessary should be changed, because we now conclude that no material issues of fact exist and this dispute can be resolved without evidentiary hearings.

2. The facts alleged by Hypercube, even if true, state no cause of action against Level 3 under applicable law.

O R D E R

IT IS ORDERED that:

1. The complaint in Case 09-05-009 is dismissed with prejudice.
2. Case 09-05-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated April 16, 2010, at San Francisco, California.

/s/ ANTONINA V. SWANSEN for
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

********** **PARTIES** **********

Michael B. Hazzard
J P BOWSER
ARENT FOX LLP
1050 CONNECTICUT AVE., NW
WASHINGTON DC 20036-5339
(202) 857-6029
Hazzard.Michael@arentfox.com
For: Hypercube Telecom, LLC

Gregory L. Rogers
Sr. Corporate Counsel
LEVEL 3 COMMUNICATIONS, LLC
1025 ELDORADO BOULEVARD
BROOMFIELD CO 80021
(720) 888-2512
Greg.rogers@level3.com
For: Level 3 Communications, LLC

********** **STATE EMPLOYEE** **********

Regina DeAngelis
Administrative Law Judge Division
RM. 5105
505 VAN NESS AVE
San Francisco CA 94102 3298
(415) 703-2011
rmd@cpuc.ca.gov

********* **INFORMATION ONLY** **********

Jason A. Koslofsky
ARENT FOX LLP
1050 CONNECTICUT AVE., NW
WASHINGTON DC 20036
(202) 857-8969
koslofsky.jason@arentfox.com

Jennifer Terry
ARENT FOX LLP
GAS COMPANY TOWER
555 WEST FIFTH STREET, 48TH FLOOR
LOS ANGELES CA 90013
(213) 629-7400
terry.jennifer@arentfox.com
For: Hypercube Telecom, LLC

Joseph P. Bowser
ARENT FOX LLP
1050 CONNECTICUT AVE., NW
WASHINGTON DC 20036
(202) 857-9102
bowser.joseph@arentfox.com

Richard Gibbs
DAVIS WRIGHT & TREMAINE LLP
NW, STE 200
1919 PENNSYLVANIA AVENUE
WASHINGTON DC 20006
(202) 973-4218
richardgibbs@dwt.com

Suzanne Toller
DAVIS WRIGHT TREMAINE
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO CA 94111-6533
(415) 276-6500
suzannetoller@dwt.com

Katie Nelson
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO CA 94111-6533
(415) 276-6500
katienelson@dwt.com

Richard H. Levin, Esq.
Attorney At Law
130 SOUTH MAIN STREET, SUITE 202
SEBASTOPOL CA 95472
(707) 523-4224
rl@comrl.com
For: Level 3 Communications, LLC

R. Keenan Davis
General Counsel
O1 COMMUNICATIONS, INC.
1515 K STREET, SUITE 100
SACRAMENTO CA 95814
(916) 554-2159
kdavis@o1.com

EXHIBIT D

Order, DeltaCom, Inc. v. Hypercube, LLC
Case No. MC-10-J-465-S (U.S.D.C. N.D.Ala.)
(March 30, 2010) (ECF Doc. 4)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DELTACOM, INC.,

Petitioner,

vs. CASE NO. MC-10-J-465-S

HYPERCUBE, LLC.,

Respondent.

ORDER

Pending before the court is petitioner's motion to quash (doc. 1) and respondent's opposition to said motion (doc. 3). Having considered said motion and response, the court finds as follows:

The motion to quash arises from a subpoena served on petitioner, a non-party to litigation in the United States District Court for the Northern District of Texas, by the respondent. In that litigation, respondent Hypercube, LLC ("Hypercube") filed suit against Comtel Telcom Assets d/b/a Excel Telecommunications ("Excel") asserting it is owed fees from Excel for providing local access telephone services for Excel's long distance telephone traffic. Relevant to the subpoena served on the petitioner and the motion to quash are the following facts:

DeltaCom, Inc. ("DeltaCom"), Excel and Level 3 Communications ("Level 3") are long distance telephone carriers. DeltaCom is also a local exchange carrier

("LEC" or "CLEC"), as is Hypercube. DeltaCom, when acting as a LEC, is a competitor of Hypercube. These local carriers are also in competition with traditional local carriers, like AT&T ("incumbent local exchange carriers" or "ILECs"). Long distance carriers ("IXCs") pay local providers an access fee for the long distance carrier's use of local provider systems to originate and terminate long distance calls. The IXCs, such as Excel, Level 3 and DeltaCom, collect fees from their subscribers and in turn pay LECs, like Hypercube, access fees for local access services. However, wireless carriers, when acting as LECs, are not allowed to impose access fees on the long distance providers.

Hypercube receives calls from wireless companies and sends them to a second LEC, which then sends the calls to Excel. Both Hypercube and the second LEC receive fees from Excel for this routing. Hypercube then splits its fee with the wireless carriers to induce wireless carriers to send their phone traffic through Hypercube's network before it is sent to a long distance carrier.

In the Texas litigation, Excel alleged Hypercube is adding an extra step to the process in order to obtain fees to which it is not necessarily entitled.[1] That litigation arose as a collection action in which Hypercube asserted Excel owed it these access

[1]Although there are other issues in the Texas action, this is the only one relevant to the subpoena before this court.

fees. According to Hypercube, Excel stopped paying Hypercube's tariffed charges for the connection services Hypercube provided. Once Excel realized what Hypercube was doing, Excel told Hypercube it did not need Hypercube's services, but Hypercube continued to receive calls from wireless carriers and direct the calls to another LEC which directed them to Excel, and continued to charge fees for this service. Excel cannot block the calls because Hypercube sends them to another LEC before they reach Excel. Additionally, there is an FCC ruling which states that an IXC cannot refuse a LEC's service, which ruling arose from the concern that end users would not be able to get or receive calls. The FCC also created "safe harbor rates" and ruled that an intermediary LEC is entitled to a rate that is the same as charged by an ILEC.

With this background, the court considers the subpoena served by Hypercube on DeltaCom, and DeltaCom's motion to quash. Rule 26(c), Fed.R.Civ.Pro., authorizes district courts, upon a showing of "good cause" by "any person from whom discovery is sought" to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... (A) forbidding the disclosure... [and] (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Rule 45(c)(3)(A) provides that the court must quash or modify a subpoena if it requires disclosure of privileged or other protected matter, or if it

subjects a person to undue burden. To compel compliance with its subpoena, Hypercube must establish that the discovery it seeks is relevant to its claims in the Texas action. *See e.g., In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation,* 2010 WL 234797, 2 (M.D.Ga.2010) (other citations omitted). Hypercube argues that it needs the documents to show the "value that competitive tandem service providers add to the nation's telecommunications network...|" Response at 6. Hypercube also asserts that it can prove what rates Excel deems reasonable by obtaining proof of CLEC rates Excel pays, such as the rates DeltaCom charges Excel when DeltaCom acts as a CLEC.

Much simplified, Hypercube seeks (1) documents that relate to communications between DeltaCom, Level 3 and Excel about Hypercube; (2) documents that refer or relate to documents relied on in preparing presentations to the FCC concerning "Hypercube-Related FCC *ex parte* meetings"[2]; (3) documents which show different access charges DeltaCom, as a LEC, charged and collected from Excel;[3] (4) copies of each contract DeltaCom entered with wireless carriers under

[2]Although seemingly unrelated to the Texas litigation, Hypercube asserts that Excel, DeltaCom and Level 3 have informally aligned in an unsuccessful lobbying effort to the FCC to establish a new class of carrier ("inserted LECs"), which is aimed at Hypercube. That effort asserts Hypercube is "inserting" itself between long distance and local carriers for reasons other than efficient routing.

[3]DeltaCom asserts that Hypercube should get these documents from Excel. Hypercube responds is that Excel cannot produce these records because its record-keeping is poor.

which DeltaCom received wireless traffic and carried it as an LEC to Excel and then received fees from Excel for such service; (5) documents showing interconnection agreements relating to DeltaCom's provision of services in connection with wireless originated calls; and (6) documents which show DeltaCom's considerations of when Hypercube or any CLEC adds value to the nation's telecommunications network.

Hypercube has failed to satisfy this court that any of these documents are relevant to the Texas litigation. That case has become focused on the issue of whether Hypercube and other intermediary LECs are merely profiting off the FCC rulings requiring IXCs to pay them access fees if the rates are within the safe harbor and the IXC serves other LECs in the area. Excel argued to the Texas court that an infinite string of unnecessary intermediary LECs could demand payment from an IXC under the FCC ruling. The Texas court stated

> ... where a CLEC is irrelevant to the ubiquity and seamlessness of the nation's telecommunications network, the IXC need not purchase its services.... Thus, the court does not here rule that Excel must pay Hypercube the fees it demands. Although the FCC has ruled that entities like Excel must pay entities like Hypercube, this requirement is enforceable only so long as Hypercube adds value to the telecommunications network. In other words, if removing Hypercube from the chain of carriers would not disturb the flow of a customer's call, Excel is not required to purchase its services.

Memorandum opinion, submitted as exhibit 1 to response (doc. 3) at 14.

Hypercube argues subpoena requests 4 and 5 seek contracts DeltaCom entered with wireless carriers to receive wireless traffic as an LEC, which it then passes to Excel, and documents sufficient to show interconnection agreements relating to DeltaCom's provision of services in connection with wireless originated calls. According to Hypercube, these documents would show that DeltaCom also bills and collects tariffed access charges from Excel. Additionally, they would show that DeltaCom, like Hypercube, is a tandem services provider and would allow Hypercube to establish with the Texas court "the competitve landscape in which Hypercube operates..." Response at 12. Hypercube also asserts this would establish that its rates are competitive with prevailing rates.

The court finds that DeltaCom's business dealings with Excel cannot assist Hypercube in demonstrating that Hypercube adds to the nation's telecommunications network. Additionally, DeltaCom's communications with Level 3 and DeltaCom's records of its own lobbying efforts with the FCC are irrelevant to Hypercube's worth to the nation's telecommunications services. When it brought its current action in Texas, the defendant in that action had a right to challenge the legitimacy of the charges sought. Whether or not DeltaCom engages in the same behavior as Hypercube, or lobbies the FCC, does not establish the merit of Hypercube's services and hence service charges. Under similar facts, a federal district court in Texas noted

> To recover under *quantum meruit* in Texas, AT & T Texas must prove that: (1) valuable services were rendered or materials furnished; (2) for Affordable Telecom; (3) which services and materials were accepted, used and enjoyed by Affordable Telecom; (4) under such circumstances as reasonably notified Affordable Telecom that AT & T Texas in performing such services was expecting to be paid by Affordable Telecom.

Southwestern Bell Telephone Co. v. Fitch, 643 F.Supp.2d 902, 910 (S.D.Tex.2009). Recovery in *quantum meruit* will be had when non payment for the services rendered would "result in an unjust enrichment to the party benefitted [sic] by the work." *Kona Technology Corp. v. Southern Pacific Transp. Co.,* 225 F.3d 595, 606 (5th Cir.2000)(citations omitted).

None of the categories of subpoenaed documents could produce information relevant to Hypercube's value to the telecommunications system.[4] Because the court finds Hypercube failed to establish that the discovery it seeks is relevant to its claims in the Texas action, the court is of the opinion that the motion to quash is due to be granted. Quite simply, DeltaCom does not carry the responsibility to provide support for Hypercube's business practices. Even if Hypercube takes illegal kickbacks, even

[4]Pursuant to Rule 45(c)(3)(B), Fed.R.Civ.Pro., the court may quash a subpoena if it requires disclosure of trade secrets or other confidential research, development or other commercial information. *Klay v. All Defendants*, 425 F.3d 977, 982 (11th Cir.2005) ("Rule 45(c) is intended to prevent abuse of the subpoena power and requires that a district court protect the property rights of the person subject to the subpoena"). Hypercube's attempts to obtain DeltaCom's presentations to customers and potential customers would fall into this exclusion. DeltaCom's agreements with Excel and Level 3 for provision of services are also within this limitation on subpoenas.

if DeltaCom does the same thing, and even if DeltaCom, Level 3 and Excel have teamed up to try to force Hypercube out of business and/or gone to the FCC to try to get Hypercube out of business, none of this has any relation to whether or not Excel owes Hypercube money for previously rendered services of value or benefit to Excel. Having so found, the court does not reach the other arguments of the petitioner and respondent.

Having considered the foregoing, and being of the opinion the motion to quash is due to be granted;

It is therefore **ORDERED** by the court that said motion be and hereby is **GRANTED**.

DONE and **ORDERED** this the 30th day of March, 2010.

INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

EXHIBIT E

Order, Hypercube, LLC v. Comtel Telcom Assets LP
Case No. 08-CIV-7428 at 2 (U.S.D.C. S.D.N.Y, Dec. 23, 2008)
(ECF Doc. 22)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
HYPERCUBE LLC,

Plaintiff,

-v-

COMTEL TELCOM ASSETS LP
d/b/a EXCEL TELECOMMUNICATIONS, INC.,

Defendant.
----------x

No. 08 Civ. 7428 (LTS)(DFE)

ORDER

Defendant in the above-captioned case has made a motion to transfer the action to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A. § 1404(a) (West 2006). "[M]otions for transfer lie within the broad discretion of the district court and are determined upon notions of convenience and fairness on a case-by-case basis." In re Cuyahoga Equipment Corp., 980 F.2d 110, 117 (2d Cir. 1992). In exercising this discretion, courts generally consider nine factors: "(1) the convenience of witnesses; (2) the convenience of parties; (3) the location of relevant documents and the relative ease of access to sources of proof; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the comparative familiarity of each district with the governing law; (8) the weight accorded to plaintiff's choice of forum; and (9) judicial economy and the interests of justice." Herbert Ltd. Partnership v. Electronic Arts Inc., 325 F. Supp. 2d 282, 285-286 (S.D.N.Y. 2004); see also In re Collins & Aikman Corp. Securities Litigation, 438 F. Supp. 2d

392, 395-98 (S.D.N.Y. 2006) (applying the nine factors and noting that plaintiff's choice of forum is generally entitled to considerable weight, but is entitled to less deference where the operative facts of the litigation bear little connection to the chosen forum); Tralongo v. Shultz Foods, Inc., No. 06 Civ. 13282, 2007 WL 844687 *2-4 (S.D.N.Y. 2007) (identifying the nine factors to be applied and noting that the convenience of witnesses is generally considered the single most important factor in the analysis).

The Court has reviewed carefully all of the submissions and proffers in light of the applicable standards. Plaintiff does not dispute that this action could have been brought in the Northern District of Texas, and the Court finds that Defendant has met its burden of making a clear and convincing showing that the factors weigh in favor of a transfer. Accordingly, the motion to transfer is granted and the Clerk of Court is respectfully requested to effectuate the transfer promptly. This order terminates docket entry no. 10.

SO ORDERED.

Dated: New York, New York
December 23, 2008

LAURA TAYLOR SWAIN
United States District Judge